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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE TUCKER FIRM, LLC, IL,)
Plaintiff,)
vs.) No. 11 C 1089
KIMBERLY ALISE,) Chicago, Illinois
Defendant.) May 14, 2013
) 9:22 A.M.

TRANSCRIPT OF PROCEEDINGS - Motion
BEFORE THE HONORABLE JEFFREY T. GILBERT, Magistrate Judge

APPEARANCES:

For the Plaintiff: THE TUCKER FIRM, LLC
1723 North Halsted Street
Chicago, Illinois 60614
BY: MS. DEBRA JEANNINE TUCKER

For Defendant McDonald
Hopkins and attorney
respondents: CLAUSEN MILLER P.C
10 South LaSalle Street
Suite 1600
Chicago, Illinois 60603
BY: MR. GEORGE K. FLYNN

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**NOTE: Please notify of correct speaker identification.
FAILURE TO SPEAK DIRECTLY INTO THE MICROPHONE MAKES PORTIONS
UNINTELLIGIBLE.**

1 **APPEARANCES: Continued**

2 For West Suburban:

MR. CLINTON JUD IND
161 North Clark Street
Suite 4700
Chicago, Illinois 60601

1 (Proceedings held in open court:)

2 THE CLERK: 11 C 1089, The Tucker Firm, LLC versus
3 Alise.

4 MS. TUCKER: Good morning, your Honor. I'm Debra
5 Tucker on behalf of The Tucker Firm --

6 THE COURT: Good morning, Ms. Tucker.

7 MS. TUCKER: -- LLC and myself.

8 MR. IND: Good morning, your Honor. Clinton Ind,
9 I-n-d, on behalf of the subpoena respondent West Suburban.

10 THE COURT: Clinton?

11 MR. IND: Ind, I-n-d.

12 THE COURT: For West Suburban.

13 MR. BERK: Good morning, your Honor. Peter Berk on
14 behalf of Kimberly Alise.

15 THE COURT: Good morning, Mr. Berk.

16 MR. FLYNN: Good morning, your Honor. George Flynn on
17 behalf of the McDonald Hopkins law firm and its individual
18 attorneys who are respondents (unintelligible).

19 THE COURT: Okay. Good morning, everybody. Couple of
20 procedural things. Okay. Number one, I got a call yesterday
21 late afternoon from someone asking us to have a court reporter
22 here today. We are unable to get a court reporter from our
23 pool of court reporters on late notice.

24 Our sound system is very good. So if anybody is going
25 to want a transcript of this, you should make sure that when

1 you're speaking, you speak into the microphone. We can get
2 transcriptions fairly quickly.

3 It is not my -- it is my practice sometimes to have
4 court reporters present sometimes, sometimes not. If you all
5 are going to want court reporters, you should give us better
6 notice than just the afternoon before for a motion.

7 Was it you, Mr. Berk, who called or your associates --

8 MR. BERK: It was our -- and we understand that there
9 is a recording process, so if there was not a court reporter,
10 we understand you can get to the recording, it is not an issue
11 for us, your Honor.

12 THE COURT: Right. It is easier, particularly with
13 multiple counsel, if we have a court reporter. I will say that
14 generally if people are asking for a court reporter then they
15 are going to write the transcript. But if you are not going to
16 write the transcript, then I would suggest having a court
17 reporter is not a necessary -- necessary exercise.

18 There is a limited amount of the court reporters.
19 We're in a budget crisis, so people are sensitive about that in
20 terms of how they get around to the courtrooms, number one.

21 Number two, I'm going to dispense, at least for the
22 time being, with this artifice of motions for leave to file
23 motions. I understand that Judge Darrah instituted that
24 because he felt he was getting inundated with motions that
25 potentially or were not well founded or were unnecessary. I

1 found it difficult to go through the entire docket to figure
2 out what motions for leave to file had been granted, so that a
3 motion was now in front of me as opposed to the -- just the
4 motion for leave to file being out there. I'm going to deal
5 with what I think are some of the motions for leave to file.

6 I have looked at some, but not all, of what's been
7 filed. And I will say that I think some of the arguments and
8 positions being taken by the parties are ridiculous. Okay?

9 So instead of having motions for leave to file, and
10 then trying to decide whether the motion should be granted, I'm
11 going to tell both sides right now that if I find people
12 abusing the process and abusing coming in front of the Court,
13 I'm going to award sanctions. I don't like awarding
14 sanctions. I think it becomes satellite litigation inside the
15 litigation. But I don't think that the motion for leave to
16 file artifice stopped you all, counsel, from filing things that
17 shouldn't have been filed. And maybe if you have to pay the
18 other side attorneys's fees for coming in here on things that
19 you shouldn't be coming in here on, that might change
20 behavior. Okay?

21 I'm familiar with the case, as you all know from your
22 prior times in front of me. And if you can't govern
23 yourselves, then perhaps sanctions is a way to go.

24 Ultimately the Court has the power to award sanctions
25 of striking claims or counterclaims. And I'm telling you right

1 now that if -- if practices continue as I see them happening
2 now, those are recommendations I'm going to make because I
3 think you ought to focus on getting this case tried, if you can
4 get it tried, and being responsible to discovery to the extent
5 you can be. Okay?

6 Let me deal procedurally with I think our some motions
7 for leave to file that are still out there so that you can get
8 whatever you want to get filed filed. It looks to me, and I'd
9 like you to take notes here because if I am missing something
10 you have to tell me, it looks to me that Docket Entry 185,
11 which is Alise's motion to quash three deposition subpoenas or
12 for a confidentiality order, I don't see any order granting
13 that motion for leave to file. But I actually see a response
14 to that. So was that filed?

15 MR. BERK: That was granted, your Honor. He granted
16 leave to file. He did grant their response and set a briefing
17 schedule for our reply, which is due, I believe, on the 24th.
18 It is unclear, at least to me, whether that's in front of your
19 Honor or Judge Darrah, since the referral came after that
20 motion was scheduled to be briefed and he set a ruling date on
21 the 19th, but it is unclear whether he meant to send that
22 motion to you or not, I just don't know.

23 THE COURT: Did he send me all discovery motions
24 essentially?

25 MR. BERK: He did, but I think it is all -- he

1 referenced certain ones in the order referring it, and all
2 future. The quash was before. So I was unclear. If it is
3 before you, that's fine, your Honor, we'll send the courtesy
4 copies to you. I just want to make sure it goes to the right
5 person.

6 THE COURT: Well, you don't have a hearing date in
7 front of him on that, right?

8 MS. TUCKER: It was the same --

9 MR. BERK: It was same --

10 MS. TUCKER: -- hearing that the referral was granted,
11 and it said all discovery disputes, all future motions and
12 discovery disputes.

13 THE COURT: Yeah, I'm going to -- my reading of his
14 order was he -- in the words of Vinnie, in My Cousin Vinnie, as
15 he finished with the witness, he got no more use for yous guys.

16 MR. BERK: And that's fine, your Honor. We just
17 wanted to make sure we're in the right place, that's all.

18 THE COURT: All right. Number 214, which is Tucker's
19 motion to compel Alise to answer interrogatories. I think that
20 was a motion for leave to file. I don't think that's been
21 granted yet.

22 Right, Ms. Tucker?

23 MR. BERK: I don't believe so, your Honor.

24 THE COURT: Okay. That's granted.

25 Number 217, which was Tucker's motion for leave to

1 file a motion compelling Alise to respond to document
2 requests. Hasn't been granted yet, right?

3 MS. TUCKER: Correct.

4 THE COURT: Okay. That's granted. Meaning you could
5 file it, not that the motion to compel was granted.

6 MS. TUCKER: Your Honor, when you say that it is
7 granted, do you want us to file it again?

8 THE COURT: Yeah. You're going to have to file the
9 actual motion.

10 MS. TUCKER: Okay.

11 THE COURT: Because procedurally or administratively
12 if I am going to rule on the motion, it has to be filed as a
13 motion.

14 MS. TUCKER: Okay.

15 THE COURT: So -- and right now it is filed as an
16 exhibit to a motion for leave to file.

17 MS. TUCKER: Correct.

18 THE COURT: So just file the exhibit as the formal
19 motion.

20 MS. TUCKER: Understood.

21 THE COURT: Number 221, Tucker's motion for leave to
22 file a motion to compel the Guterman parties. That is a motion
23 for leave to file, right? That hasn't been granted yet?

24 MS. TUCKER: Correct.

25 THE COURT: Okay. So that's granted. You have to

1 file the actual motion.

2 MS. TUCKER: And your Honor --

3 THE COURT: And then --

4 MS. TUCKER: I'm sorry. To be clear, I know that you
5 are headed out of town --

6 THE COURT: Uh-huh.

7 MS. TUCKER: -- and your standing orders require three
8 days's notice. Do we have permission to notice these up for
9 the hearing that we already have before you on Thursday?

10 THE COURT: No. I mean, I have to deal with the
11 Thursday hearing.

12 MS. TUCKER: Okay.

13 THE COURT: But I want you to file the actual motions,
14 and then I think we're going to try to deal with dates by which
15 responses will be filed to any of these that need responses;
16 replies, if they need replies; and then hearing dates. And the
17 hearing dates are going to be in June. So -- but I'll deal
18 with what we have -- I'm not exactly sure what we have on
19 Thursday. But if we can get deal with at least whatever is up
20 on Thursday, I'd like to deal with that today too and not have
21 you have to come back.

22 MS. TUCKER: Okay. So when we file --

23 THE COURT: Just file the motion --

24 MS. TUCKER: -- the motions.

25 THE COURT: -- without any notice of motion.

1 MS. TUCKER: Okay.

2 THE COURT: In other words --

3 MS. TUCKER: Understood.

4 THE COURT: -- the motions to compel or to -- the
5 motions to compel that you were seeking leave to file, file
6 those motions, do not notice them up yet. Just let's get them
7 on the record, and then they will come up with a little gavel,
8 which means they need a ruling.

9 MS. TUCKER: Okay. Understood.

10 THE COURT: Okay? But we'll deal with when they are
11 going to be heard.

12 MS. TUCKER: Uh-huh.

13 THE COURT: And then procedurally it looks like Docket
14 Entry 219, which is -- which was filed by plaintiff is a
15 duplicate -- the .PDF that is attached to Docket Entry 219 is
16 actually --

17 MS. TUCKER: Your Honor --

18 THE COURT: -- the .PDF that is 217.

19 MS. TUCKER: -- that is a duplicate, and she -- my
20 legal assistant is working this morning to remove that.

21 THE COURT: Okay. So my -- well, my order will say it
22 is stricken.

23 MS. TUCKER: That's fine.

24 THE COURT: 219 is stricken as duplicative of 217.

25 MS. TUCKER: Absolutely.

1 THE COURT: Okay.

2 MR. BERK: Your Honor, there are two other motions
3 that there was leave requested and granted. Plaintiff
4 requested time to respond. Judge Darrah granted that. They
5 have actually filed responses, but there is no actual motion on
6 file. I actually called your courtroom deputy yesterday just
7 to see, and it was suggested that we discuss that today. It is
8 a motion to compel plaintiff to respond to document request --
9 certain document requests, interrogatories, and it is a motion
10 to compel a third party, the Nathanson law firm, to respond to
11 subpoena.

12 Those two motions, leave to file was granted.

13 Ms. Tucker, plaintiff, has filed a response to each of those.
14 But I understand that there is a motion on file. I don't know
15 how you'd like to proceed, whether you'd like to actually file
16 a motion, have her file the response, and then we will reply or
17 how you would like to proceed on that.

18 THE COURT: Well, it looks to me like Alise's motion
19 to compel Tucker to respond to discovery, which was Docket
20 Entry 188, leave to file was granted. So I'd like you, Alise,
21 to actually file your motion.

22 MR. BERK: Right. That's what I wanted to check.

23 THE COURT: And then I have seen Tucker's response to
24 that motion, which I think leave -- you were given leave to
25 file.

1 MS. TUCKER: Yes, and we did file.

2 THE COURT: Okay. So you should file of record your
3 motion to compel --

4 MR. BERK: Okay.

5 THE COURT: -- on the discovery responses.

6 MR. BERK: Right.

7 THE COURT: And you should also file of record your
8 motion to compel the Nathanson law firm leave to which you were
9 given -- leave to file which you were given.

10 MR. BERK: Right. The issue, your Honor, is our
11 understanding of how Judge Darrah wanted to proceed is not to
12 attach hundreds of pages of motions, exhibits. We didn't
13 attach actual motion, we filed. So it is going to look
14 different than the motion for leave.

15 We had asked him previously what do you want in the
16 motion for leave, and he said I want the detail about why you
17 need it. But he made it clear to us, at least from our point
18 of view, that he didn't hundreds of pages attached to it and
19 things like that that would be coming like in the motion to
20 compel. So it may look different. And I'm concerned -- she
21 has already filed a response, so I don't know how you want to
22 deal with that. I just want to be clear on the record as to
23 what we're going to do.

24 THE COURT: Well, she's filed a response on -- she's
25 filed -- Tucker has filed a response on Nathanson.

1 MR. BERK: Yes.

2 THE COURT: I'm going to deal with Nathanson this
3 morning.

4 MR. BERK: Okay.

5 THE COURT: And I'll take into consideration what you
6 have just said.

7 MR. BERK: Yes.

8 THE COURT: Ms. Tucker has also filed a response on
9 the motion to compel or to respond to discovery.

10 MR. BERK: Yeah.

11 THE COURT: And you're saying that would look
12 different too?

13 MR. BERK: Yes. I believe that would look different,
14 your Honor.

15 THE COURT: Okay.

16 MR. BERK: Because what was in the motion for leave
17 was an explanation (unintelligible) was referred and why we
18 needed it, it did not go through, other than an attached letter
19 to soft of explain where the parties were at, it did not go
20 through each request which your Honor may want in -- or I would
21 assume a court, whether it was you or Judge Darrah at the time,
22 would want a sort of more explanation of it. We certainly will
23 try to make it look as much like the motion as possible. We
24 don't want to delay the process.

25 THE COURT: Well, okay. On the -- to the extent that

1 you had been given leave to file -- that Alise has been given
2 leave to file the motion to compel Ms. Tucker to respond to
3 certain discovery and to the extent that Alise has been given
4 leave to file a motion to compel the response to the subpoena
5 to the Nathanson law firm, now that you have been given leave
6 to file those motions, you should file your motions --

7 MR. BERK: Yes.

8 THE COURT: -- as you want them to look of record.

9 All right?

10 MR. BERK: Yes.

11 THE COURT: To the extent that Ms. Tucker needs to
12 respond to that again, we can deal with that. To the extent I
13 need to set it for hearing, I'm going to deal with that.

14 The only motion that I actually set for hearing this
15 morning formally was the motion to compel West Suburban. I'm
16 prepared to deal with that.

17 However, because you were given leave to file the
18 motion to compel with respect to Nathanson, because that's a
19 third-party subpoena, because I think it suffers from the same
20 defects as the motion to compel West Suburban, I intended to
21 deal with those today. And I'm going to deal with them today
22 to the extent I can both -- both procedurally and potentially
23 substantively. Okay?

24 MS. TUCKER: And, your Honor, there are some motions
25 that we're missing because you mentioned a motion to compel

1 Guterman parties. There is a motion to compel Guterman's
2 business personnel, which are located at three companies. And
3 then there was a motion that we filed yesterday to compel
4 Guterman ECDS and Malo, that you referenced Number 221. I'm
5 not -- I'm not sure if that is the Guterman parties and the
6 terms of the outsourced business personnel or that's the one
7 that we filed yesterday with respect to Guterman himself and
8 ECDS and Malo. But there are two separate motions with respect
9 to those groups of people.

10 THE COURT: 221 is something that's called Tucker's
11 motion for leave to file motion to compel the Guterman parties.

12 MS. TUCKER: Okay. Can you tell me in the motion
13 you're looking at who the Guterman parties are --

14 MR. BERK: I have it here, your Honor. It is Seth
15 Guterman, ECDS, and Malo the Dog, collectively the Guterman
16 parties. That's on page 1 of Exhibit 1 --

17 MS. TUCKER: Okay.

18 MR. BERK: -- to the motion for leave --

19 MS. TUCKER: So then the motion that we're missing is
20 with respect to the outsourced personnel business. So
21 that's --

22 THE COURT: And what -- which -- do you have any idea
23 what --

24 MR. BERK: I believe that's covered, your Honor, by
25 the motion to quash, which is being briefed, unless I'm missing

1 -- I'm not thinking of the motion she's talking about.

2 MS. TUCKER: Well, you only mentioned one motion to
3 quash. There is the McDonald Hopkins personnel, and then there
4 is the outside business personnel of Guterman.

5 THE COURT: Okay. I have no idea what motion that
6 is. All right? But, you know what, let me deal with these
7 motions to compel third parties generally. Okay?

8 You know, before I do that, let me hear briefly --
9 let's tee up the motion to compel West Suburban. Mr. Ind --

10 MR. IND: Yes.

11 THE COURT: -- is here.

12 What do you have to say Mr. Ind? I'm sorry.

13 MR. IND: No, that's quite all right. My client is in
14 a precarious situation. He represents one of the parties to
15 this litigation. There is an assertion of confidentiality of
16 the documents that are potentially producible as relevant to
17 this litigation.

18 Understanding that my client has obligations under the
19 subpoena rules, so understanding that he has obligations
20 pursuant to his client and maintaining the issues of
21 confidentiality, therein lies the reluctance of my client to
22 just outwardly produce everything that is potentially
23 responsive to these subpoenas, especially in light of the issue
24 associated with the confidentiality order -- excuse me -- that
25 is, I believe, being briefed at this point in time. I think it

1 has been maintained throughout this litigation that as long as
2 there is a confidentiality order, then everything that is
3 potentially producible is responsive to the subpoena, will be
4 produced without any holding back aside from the potential of
5 any limited privilege issues.

6 So the position as far as West Suburban goes at this
7 point in time is there -- we really want to see some kind of a
8 confidentiality order in place such that my client is not
9 disclosing information that his client is deeming confidential
10 at this point in time.

11 THE COURT: Uh-huh. There is an allegation in
12 Ms. Tucker's motion that your client, and I think I hear you
13 saying essentially the same thing, your client stands ready to
14 respond to the subpoena and produce relevant -- or information
15 that's responsive to the subpoena to the extent you can
16 determine what's responsive. But your client's client,
17 Ms. Alise, is interfering with your ability to produce that by
18 saying, don't produce it unless there is a confidentiality
19 order in place?

20 MR. IND: Well, there is a -- it is not like Ms. Alise
21 is contacting and saying don't produce it, absolutely don't
22 produce it.

23 THE COURT: Uh-huh.

24 MR. IND: He is aware of the confidentiality of the
25 information.

1 THE COURT: Uh-huh.

2 MR. IND: And he's not producing it based on that
3 confidentiality.

4 THE COURT: And when you say -- and when you say the
5 confidentiality of the information, is that because there is
6 any statutory protection of anything he has or he just
7 considers his communications with Ms. Alise business
8 communications, financial communications to be confidential in
9 the vernacular as opposed to -- as a trade secret or covered by
10 some type of statutory privilege?

11 MR. IND: He is the accountant, and he has been acting
12 as the accountant, so there is an accountant privilege
13 associated with many of the communications.

14 THE COURT: Minimal though, right?

15 MR. IND: Well, there is a four-part test that we
16 would have to adhere to to make the statutory privilege stick.

17 THE COURT: Yes.

18 MR. IND: To this point in time, you know, we're
19 looking at information that is sensitive to the client.

20 THE COURT: Uh-huh.

21 MR. IND: So, you know, he understands that it is
22 sensitive to the client, and he doesn't want to produce that
23 because, you know, the client is -- he's aware of the client's
24 confidential -- issues associated with confidentiality of the
25 documents.

1 THE COURT: Uh-huh. What's the issue -- I have not
2 delved into this, but what -- is there no confidentiality order
3 in place in this case yet?

4 MR. BERK: Your Honor, no, there is not.

5 THE COURT: Why not?

6 MR. BERK: The history on that is somewhat complex.
7 Back when they first subpoenaed West Suburban, we notified
8 them, among other subpoenas they sent out for very confidential
9 information, we said, we need a confidentiality order over
10 these type of materials. The materials that I understand that
11 Mr. Ind's client has are tax returns of Ms. Alise and I think a
12 couple documents that may relate to settlement negotiations.
13 We have asserted repeatedly to Ms. Tucker our position that
14 those are confidential. And she can have them so long as there
15 is a confidentiality order in place.

16 THE COURT: Why are they confidential?

17 MR. BERK: Which ones?

18 THE COURT: Any of -- well, I mean, tax returns maybe,
19 but -- I mean, how are they confidential -- how are they
20 confidential within the meaning of the model confidentiality
21 order that this Court has adopted for use in litigation here?

22 In other words, the settlement documents.

23 MR. BERK: There is case law that we have cited to
24 Ms. Tucker and in various letters and certainly have cited in
25 the motion to quash which says that while settlement

1 documents -- settlement negotiations are discoverable, that
2 they should be -- our reading of the case is they should be
3 discovered restricted due to the policies behind settlement
4 negotiations to foster that communication, to foster those
5 negotiations, that those type of discussions should be
6 confidential.

7 Again, we have told her from the beginning when she
8 started requesting these documents, you can have them. This
9 came up with respect to Mr. Gutzke's subpoena. We said it is
10 no problem, we just need a confidentiality order. The response
11 I got from them was, we're not giving you a confidentiality for
12 anything. Nothing is confidential. You haven't proven
13 anything. You haven't shown us that there would be definitive
14 harm by releasing settlement discussions, tax returns, HIPAA
15 information, things that were being requested.

16 Only when we brought a motion to Judge Darrah
17 initially for leave to file a motion for confidentiality order
18 did they finally propose a counter one. Judge Darrah denied
19 that stating on the record that what he wanted was more detail
20 about why we needed it. That detail has been provided in part
21 in the motion to quash briefing, because the alternative to the
22 motion to quash is to enter the confidentiality order we
23 proposed.

24 And actually on the confidentiality order, the parties
25 are not all that far apart on what it should say. There are

1 mainly two provisions which I can talk about, your Honor. But
2 getting back to the -- your question, tax returns have
3 significant individual financial information. Ms. Alise's tax
4 returns also have her children's information on there. She has
5 two dependents. There have -- there is information on there
6 that's not relevant to the case we'd like to redact.

7 But Ms. -- what we're concerned about is really the
8 plaintiff using these documents to publicize them around the
9 internet. She certainly doesn't want her tax returns put all
10 over the court pleadings and everything. And we're fine with
11 her having them.

12 What has happened in the past is any documents that
13 have gone to Ms. Tucker have somehow ended up in a pleading.
14 And we're concerned about these documents suddenly -- her tax
15 returns, Ms. Alise's tax returns, showing you on the internet
16 in various court pleadings.

17 We have no problem with her having them, the relevant
18 portion thereof, we just don't want them publicly filed.

19 THE COURT: Okay. What is the briefing
20 schedule -- what is the current status of the briefing of the
21 motion to quash or, alternatively, the confidentiality order?

22 MR. BERK. The motion to quash, the response was filed
23 on the 10th, I believe. Our reply is due on the 24th. That's
24 concurrent with the briefing on Ms. Tucker's motion for
25 reconsideration of Judge Darrah's denial of a different motion.

1 THE COURT: Of Judge Darrah's denial of what motion?

2 MR. BERK: Ms. -- plaintiff filed a motion -- a motion
3 to compel McDonald Hopkins produce documents, motion for leave
4 to file a motion to compel McDonald Hopkins. That was denied.

5 Subsequently she brought a motion to compel based
6 on -- based on a second subpoena she had served. Judge Darrah
7 denied that.

8 Plaintiff filed a motion for reconsideration. That's
9 being briefed on the same track as the motion to quash was, and
10 Judge Darrah set a hearing on that for June 19th.

11 So the 24th will have the quash reply, as well as the
12 reconsideration reply, to the extent that impacts your
13 decision, your Honor.

14 MS. TUCKER: But, your Honor, I believe that that June
15 19th hearing has been changed by Judge Darrah to a status
16 hearing given the referral of discovery to you.

17 THE COURT: Okay.

18 MS. TUCKER: So that's --

19 MR. BERK: I believe that's correct.

20 MS. TUCKER: It is not a motion hearing date.

21 THE COURT: All right. Thank you. And I am content
22 -- you can tell Judge Darrah, to deal with your motion to quash
23 or, in the alternative, for entry of a confidentiality order.
24 All right?

25 I'm not going to deal with any motion to reconsider

1 Judge Darrah's priors orders.

2 MR. BERK: I don't think that was sent to you, your
3 Honor. I believe that's correct.

4 THE COURT: Okay. Let me say with respect to.

5 MS. TUCKER: No, the -- your Honor, the motion for
6 reconsideration was granted. So it was -- he -- he denied us
7 leave to file a discovery motion. Okay?

8 THE COURT: Uh-huh.

9 MS. TUCKER: The motion for him to reconsider allowing
10 us to file that discovery motion. He has -- he has dealt with
11 the motion for reconsideration part. So now it is just a
12 discovery motion because he's undone his previous ruling which
13 was just denying the leave.

14 But now he granted us leave to file the discovery
15 motion.

16 MR. BERK: Yeah.

17 THE COURT: And what particular discovery motion was
18 that? I see Mr. Flynn changing positions with Mr. Berk, so it
19 must have something to do with McDonald Hopkins.

20 MS. TUCKER: Yes, it does. It is to compel the
21 McDonald Hopkins attorneys. So the motion for reconsideration
22 has already been dealt with.

23 THE COURT: Okay.

24 MS. TUCKER: So it is just --

25 MR. FLYNN: I don't believe that's correct, your

1 Honor.

2 MS. TUCKER: It is a substantive discovery motion.

3 THE COURT: Okay. Well --

4 MS. TUCKER: (Unintelligible).

5 THE COURT: To the extent that there is a disagreement
6 about what Judge Darrah meant with -- in his ruling on the
7 motion for reconsideration, I'm going to leave that to Judge
8 Darrah.

9 To the extent that there is going to be a motion to
10 compel McDonald Hopkins --

11 MS. TUCKER: Yes.

12 THE COURT: -- my guess is it is coming to me.

13 MS. TUCKER: Yes. And that is the only motion that is
14 currently outstanding. Because, as I said, Judge Darrah has
15 already ruled on the motion for reconsideration element of
16 that.

17 THE COURT: Okay.

18 MR. FLYNN: And, your Honor, I don't believe that's
19 accurate, your Honor.

20 MS. TUCKER: Well, it is --

21 THE COURT: Well, it either is or it is not, but
22 that's something that is going to be in front of Judge Darrah
23 it seems to me.

24 Let me tell you this. I will deal with your motion
25 either to quash or to enter a confidentiality order. We have a

1 confidentiality order, a model confidentiality order, in this
2 district. Both of you are probably familiar with that order
3 judging from your nodding of your heads.

4 To me that is -- without hearing anymore, I would have
5 to be convinced on a clear and convincing standard, let's say,
6 that that order should be altered for this case. That order
7 says that -- it defines confidential information in paragraph
8 2. It says, information -- it includes information prohibited
9 from disclosure by a statute, information that reveals trade
10 secrets, research, technical, commercial or financial
11 information that a party has maintained as confidential.
12 Medical information, personal identity information, income tax
13 returns, W-2 forms, 1099s, personnel or employment records of a
14 person who is not a party to the case. And to my mind I
15 haven't looked at your briefing on the confidentiality order
16 yet, but to my mind that could be sufficient. Okay?

17 So you're talking about tax returns. That's covered
18 in this order. You're talking about personal identify
19 information, you're talking about Social Security Numbers,
20 you're talking about children's names, races, sexes, all this
21 stuff should be covered by this confidentiality order.

22 As far as I am concerned, however, financial
23 information that is not maintained as confidential,
24 uncomfortable information, sensitive information most of the
25 time doesn't come within it. You all have chosen to litigate

1 publicly, in a public forum, in a public court issues that
2 are -- that are at issue between you. And if the materials
3 fall within the context of this order, they are confidential.
4 If they don't fall within the context of this order, my best
5 guess they are not, unless I am convinced at a fairly high
6 level that a particular document or category of information
7 should be treated as confidential.

8 In terms of the West Suburban information, for
9 example, to the extent that an accountant privilege applies and
10 there is no exception, I have some familiarity with the
11 accountant's privilege in Illinois. I don't -- I know that
12 there is some authority about whether that even applies in
13 federal court. Okay? And to the extent it does, I think it
14 is -- it may be limited. I'm not weighing in on that now. All
15 right?

16 But I am not inclined in this case to let any party
17 litigate in secret. The Seventh Circuit has spoken clearly on
18 that. Judge St. Eve has some very good opinions on that.
19 Other judges in this district have good opinions on it. And I
20 think they -- those opinions generally hit the mark, which is
21 if you choose to litigate in public, other than materials that
22 really are -- the case law says should be confidential, they
23 are not.

24 All right. So I'm going to look at this -- or maybe
25 I'm even going to set this particular motion for hearing so

1 that we can get this confidentiality order issue out of the
2 way. I would love to get the issue out of the way so that West
3 Suburban can produce. Okay? But I'm not prepared to deal with
4 it now.

5 Let me though deal with these motions to compel
6 generally in these third party situations. Okay? I do not
7 see -- cutting through all this stiff, I mean I know Mr. Ind is
8 here, and I'm glad he's here. Okay? However, I don't see any
9 authority that third-party subpoenas under Rule 45 can be
10 enforced against the third party on a motion to compel on a
11 couple -- in a couple of situations. Number one, these
12 subpoenas seem to me to have all been served by certified
13 mail. Okay? Unless you can show me that the third-party
14 deponent has actually agreed to accept these subpoenas by
15 certified mail, I think Rule 45 says they should be served by
16 somebody over the age of 18.

17 MS. TUCKER: Your Honor, there is actually some case
18 law on that. I have looked at it quite a while ago, so I'm not
19 necessarily current on it. But it says that the actual -- the
20 postal delivery person is -- you can presume that they will be
21 over the age of 18. And because that is hand delivery that --
22 I believe the case law shows that that is sufficient by
23 certified mail.

24 THE COURT: Okay. And does it -- and is there
25 authority that says -- and I don't know whether that's good

1 practice or not good practice or whether I'm going to accept
2 that practice. Okay?

3 And then there is another issue about whether that's
4 sufficient to compel somebody to do something.

5 And the third is under 45(e), I think, to me the -- I
6 understand that the proper procedure if a third party is not
7 responding to a subpoena is there rule to show cause why that
8 third party should not be held in contempt. Okay?

9 Now nobody cites any law in any of these motions to
10 compel. With respect to the Nathanson subpoena, I'm not sure
11 whether Mr. Nathanson agreed to accept the subpoena or not or
12 where that stands.

13 MR. BERK: I should explain that a little because I
14 was involved in that.

15 THE COURT: No, I don't want to hear that.

16 MR. BERK: Okay.

17 THE COURT: Because -- but to me if you proper serve a
18 third party and there is no doubt that the third party received
19 the subpoena in a way that is proper under the Federal Rules of
20 Civil Procedure, and that person is not responding to the
21 subpoena, I think the proper procedure is a rule to show cause
22 why that person shouldn't be held in contempt.

23 I would have that person in. We would have a
24 hearing. Now if -- if a party, like Alise, is preventing a
25 third party, like West Suburban, from responding to a lawful

1 subpoena, in a rule to show cause situation, West Suburban can
2 come in and say, look, we're prepared to respond. And I hear
3 Mr. Ind saying today we're prepared to respond provided that
4 there is a proper confidentiality order and provided any
5 legitimately confidential or privileged information is
6 protected. Okay?

7 But if I get wind that one party or the other is
8 preventing a third party from responding to a lawfully served
9 subpoena, I'm going to have a hearing. And if that person is
10 interfering with the judicial process, then they're -- that's
11 sanctionable activity, period.

12 It sounds to me though that this motion to compel West
13 Suburban -- Mr. Ind, has West Suburban actually responded in
14 writing to this subpoena?

15 MR. IND: (unintelligible) with West Suburban, your
16 Honor, there was a response, a limited response.

17 THE COURT: Well, I saw a limited production of
18 document. But was there actually a written response to the
19 subpoena?

20 MR. IND: The written -- I mean, the written response
21 was not consistent with your privilege log and the rules that
22 we're generally accustomed to.

23 THE COURT: Uh-huh.

24 MR. IND: But, yes, technically there was a written
25 response.

1 The documents -- it is (unintelligible.)
2 You know, the documents that West Suburban has to
3 respond (unintelligible) in the future are relatively limited.
4 And aside from the tax returns -- I wish we had some tax
5 returns. But -- so there isn't really that much to respond to
6 in addition to what's already been produced.

7 THE COURT: Uh-huh.

8 MR. IND: I have spoken with Ms. Tucker's firm, a
9 representative of Ms. Tucker's firm about that. So, you know,
10 it would not take long to do. But as your Honor has repeatedly
11 stated, you know, the issue of the confidentiality order which
12 really West Suburban's position is we don't want to be in
13 a -- at the forefront of disclosing confidential information
14 when our position is that it should have been taken care of a
15 long time ago so that we can just produce pursuant to the order
16 that's entered.

17 THE COURT: Okay. Well, it sounds to me like the
18 only -- the only impediment right now to your client making a
19 more fulsome production in response to the subpoena is the
20 confidentiality order.

21 MR. IND: That's correct.

22 THE COURT: Ms. Tucker, you don't agree with that?

23 MS. TUCKER: I was just suggesting that the only thing
24 that they could have that would be potentially confidential
25 covered by the model order would be Ms. Alise's tax returns,

1 and we have no issue whatsoever with them being deemed
2 confidential. So perhaps we could just expedite this, and that
3 should not be an issue.

4 THE COURT: Well, I bet you there could be some
5 personal identity information there too.

6 MS. TUCKER: And we're fine with that too. I already
7 know her Social Security number, I already know her kids's
8 names. But if they want to redact that from -- I don't believe
9 that that information is disclosed on tax returns --

10 THE COURT: Okay. By Mr. Ind --

11 MS. TUCKER: -- they can just redact it.

12 THE COURT: But, Mr. Ind, what if I were to -- what if
13 I were to order that West Suburban produce -- respond to the
14 subpoena. And if you -- and I think it is always helpful to
15 respond in writing, okay, on a point-by-point basis.

16 West Suburban respond to the subpoena, produce the
17 documents subject to our model confidentiality order, and
18 subject further to any modifications to that order that I end
19 up making after I hear the full argument. So that -- so that
20 your production would be covered -- I mean, I -- in fact, I'll
21 tell you what I would do, okay? I'm going to enter -- well,
22 no, because it has got --

23 MS. TUCKER: Your Honor, the parties have proposed
24 minor changes to the model. I have --

25 THE COURT: Okay.

1 MS. TUCKER: -- our proposed version here with me.

2 THE COURT: Yeah, but I'm not going to treat with that
3 right now.

4 What I am going to say is -- I mean, I would like to
5 get this moved -- I'd like to move this off the docket, so what
6 I'd like to say is that --

7 MR. IND: You know, what I suggest, because I know
8 that the hearing is potentially set or at least it was a
9 tentative hearing date set for motions to quash subpoenas --
10 and I apologize (unintelligible) related (unintelligible) --

11 THE COURT: Uh-huh.

12 MR. IND: But there is a motion to quash subpoenas or
13 a motion for a confidentiality order in place. I know that the
14 distinction or the differences between the model
15 confidentiality order, as your Honor is looking at, and the
16 proposed changes are significant to the parties. Whether that
17 rises to the clear and convincing level that you are discussing
18 is another issue. But, you know, I would prefer, because there
19 would potentially be ambiguity if we were to produce it and say
20 (unintelligible) --

21 THE COURT: Uh-huh.

22 MR. IND: -- under the model confidentiality order,
23 which may expose it to reproduction to (unintelligible).

24 And then two weeks later, on June 19th, whatever that
25 hearing date is, this more stringent (unintelligible)

1 confidentiality order.

2 THE COURT: Okay.

3 MR. IND: My client's comfort level would be just to
4 -- I mean, we're happy to produce, as I have said, but until
5 after the whole confidentiality issue has been dealt with.

6 THE COURT: Okay. Look, I'm a little reticent to wade
7 into this not knowing what I am doing on the confidentiality
8 order front. I don't really know what the issues are between
9 you. So I'll accede to what Mr. Ind is saying, which is -- I
10 mean, what I understand you to be telling me is if a
11 confidentiality agreement -- confidentiality order that is
12 either acceptable to the parties or to the Court is entered,
13 West Suburban will produce documents.

14 What I would like you to do though as an interim step,
15 even before that confidentiality order is entered, is respond
16 in writing to this subpoena, okay, saying we are prepared to
17 produce documents in response to these categories or not. If
18 you -- if you have a question about whether or not a particular
19 category is vague or ambiguous and you need additional
20 language, I'd like to initiate that correspondence with
21 Ms. Tucker so that we are prepared at some point when a
22 confidentiality order is entered to have that happen.

23 MR. IND: Absolutely.

24 THE COURT: And how long will it take you to do that?

25 MS. TUCKER: Your Honor, we have actually already done

1 that. And I believe that there is a limited subset of
2 documents that they have that have been collected. So we have
3 already had those sorts of conversations. As I understand it
4 the only hold up is his fear that Ms. Alise will claim that he
5 violated her confidentiality.

6 So we are good between ourselves as far as the
7 collection of documents and the scope of that production once
8 Ms. Alise's confidentiality --

9 THE COURT: Okay.

10 MS. TUCKER: -- (unintelligible).

11 THE COURT: Okay.

12 MR. BERK: Your Honor --

13 THE COURT: Let me ask you this, do you know how long
14 it will take you, Mr. Ind, or your client after the
15 confidentiality order is entered to produce?

16 MR. IND: It really would be a very limited amount of
17 time. We're talking, you know, seven to 14 days probably.
18 Depending on schedules, of course, not of mine, but of my
19 client's. But it would not be a long period of time.

20 THE COURT: Okay.

21 MR. BERK: And, your Honor, if I may just add one
22 thing to the discussion. One other issue we raised is our
23 request to redact certain irrelevant information, charitable --
24 you know, I can think of things off the top of my head that are
25 on tax returns that are not relevant to this case, charitable

1 donations, dependent care. Things like that that may not be
2 relevant, we'd like redacted off. We don't think there is any
3 reason. We have raised that, and we would brief that in the
4 motion. I don't know how your Honor would like to handle that,
5 but I just wanted to make the record clear as to we have made
6 that objection as well that certain information in the tax
7 returns is not relevant and should not be disclosed in any
8 event.

9 THE COURT: Okay. You have no standing yet to raise
10 that issue because you don't have a motion for protective order
11 on file. All right? And, you know, my -- I want to be real
12 clear here. All right? Third-party subpoenas are between a
13 party here and the third party. That's why I have been
14 addressing Mr. Ind and Ms. Tucker. Okay?

15 To the extent that anybody is going to interfere with
16 a party's response to a third-party subpoena, they are going to
17 have to -- they have to be real careful. Okay? So if you have
18 motion for a protective order to file on behalf of Ms. Alise,
19 who is a party to this litigation, you ought to file it.

20 MR. BERK: Okay.

21 THE COURT: Okay? I think you ought to think hard
22 about filing a motion that's based on relevance and not
23 privilege and not some type of statutory protection. All
24 right? Because relevance is pretty broad here. And to me I
25 don't know right now the relevance of charitable contributions

1 or not. But if they part of a tax return and the tax returns
2 are going to be produced under a confidentiality order and the
3 material can't be used other than in this case, then I would
4 think hard about whether or not you have good grounds to say
5 that this information is neither relevant nor will likely -- be
6 likely to lead to the discovery of admissible evidence. I'm
7 not ruling on it right now, I'm just telling (unintelligible)
8 want to file it.

9 And I'm also -- this is also subject to what I said at
10 the beginning of this process, which I do not want to deal with
11 ridiculous motions, unnecessary motions. And to the extent
12 that they are filed and to the extent that somebody has to
13 respond to them, I'm going to think hard -- I haven't done it
14 in this case I don't think up until now -- but I'm going to
15 think hard about whether or not the federal rules provide a
16 burden shifting mechanism here to stop unnecessary motion
17 practice. Okay?

18 So when things are produced under a confidentiality
19 order, courts are a little less willing to look at relevance
20 objections. Okay?

21 MR. BERK: Understood, your Honor. I just raised it
22 because it was just a part of the complete picture.

23 THE COURT: Fine.

24 MR. BERK: And we certainly will take your comments
25 into account whether we would file the motion. Any future

1 motion we'll take those comments into account as well.

2 THE COURT: Okay. I -- to my way of thinking, with
3 Mr. Ind here representing West Suburban, and with respect to
4 the only issue now as I understand it being the entry of a an
5 appropriate confidentiality order, okay, I'm going to deny
6 without prejudice the motion to compel West Suburban. All
7 right? It seems to me that -- and what I would -- will say is,
8 Mr. Ind, to protect your client, but also to encourage your
9 client, I'm going to say that West -- in my order it will say
10 West Suburban will produce documents responsive to plaintiff's
11 subpoena within 14 days of entry of an appropriate
12 confidentiality order.

13 MR. IND: Absolutely, your Honor.

14 THE COURT: Okay?

15 MS. TUCKER: If your Honor -- I'm a little bit
16 confused. Because the motion is our motion to compel, and you
17 have just said that you are denying the motion to compel.

18 THE COURT: I am because I don't think it is
19 necessary. I mean, you have got somebody right here saying,
20 I'm going to produce. I don't have any problem with producing
21 subject to an appropriate confidentiality order. What am I
22 going to compel him to do?

23 I'm going to deny the motion to compel -- well, I'll
24 deny. Okay.

25 MS. TUCKER: But we need -- we need to compel them --

1 MR. BERK: Perhaps, your Honor --

2 MS. TUCKER: -- because they are not willing to
3 produce given --

4 THE COURT: Absent compulsion?

5 MS. TUCKER: -- Alise's objections.

6 MR. BERK. Perhaps, your Honor --

7 MS. TUCKER: Absent compulsion.

8 MR. BERK: Perhaps you can just continue the motion --

9 MS. TUCKER: Oh, and, your Honor --

10 THE COURT: No, no, no, no, I -- no, I don't want to
11 -- okay

12 MS. TUCKER: And, your Honor --

13 THE COURT: Okay.

14 MS. TUCKER: Your Honor, I'm sorry, can I please speak
15 to this issue? There is -- I'm a CPA, and so there is a
16 federal tax statute. Perhaps Mr. Ind is not familiar with it.
17 But these are the sorts of protections that he is looking for.
18 It is under the Internal Revenue Code. And what it says is
19 that an accountant cannot produce, absent an order of this
20 Court or consent of their client.

21 THE COURT: Right.

22 MS. TUCKER: Now it doesn't -- it is not a privilege.
23 It just says that his client would be guilty of a misdemeanor
24 if he didn't get an order from this Court. So he needs the
25 opposite order --

1 THE COURT: Right.

2 MS. TUCKER: -- from this Court compelling him to
3 produce or he needs Alise's consent, which he doesn't have.

4 THE COURT: Right. No, I -- thank you. I know the
5 statute. It talks about producing filed returns or something
6 like that to somebody other than the party.

7 MS. TUCKER: Yes, it is tax --

8 THE COURT: Right.

9 MS. TUCKER: -- information, but that's what we're
10 talking about is tax information.

11 THE COURT: Okay. It is -- so form is important
12 here. So let me retract what I said.

13 MS. TUCKER: Okay.

14 THE COURT: I'm going to grant the motion to compel.
15 I'm going to orders that West Suburban produce documents
16 responsive to the subpoena within 14 days of entry of an
17 appropriate protective order.

18 I'm telling you right now though I'm not 100 percent
19 sure that a motion to compel is the right way to go here, but
20 I'm going to grant it because I think just procedurally I'd
21 like to move that out of the way and get us to the point of
22 getting the documents. Okay?

23 So my order will say, we had a hearing on the motion,
24 the motion to compel is granted. And West Suburban will
25 produce responsive documents within 14 days of entry of an

1 appropriate protective order.

2 Okay. If you -- I have two cases on my 10:00 o'clock
3 status call. I don't think that they are going to be long.
4 Can you hang around -- Mr. Ind, you don't need to hang around.

5 MR. BERK: I may have an issue depending how long
6 those take. I have to get north for a funeral at noon.

7 THE COURT: Okay. I -- so --

8 MR. BERK: If I can be out of here about 10:30, 10:45,
9 I can be assured of making it. I just don't want to be late,
10 your Honor.

11 THE COURT: Okay. Okay. Let me just -- I just want
12 to see what we can accomplish, and then we'll set things in the
13 future. But I just can want to see if there is anything else
14 we can accomplish.

15 I don't think these two matters should take long. If
16 they do, you're excused, and we'll reset this at some point.

17 MR. BERK: Thank you, your Honor.

18 THE COURT: I'm doing this though because as you know
19 I'm going to be out of town, so I want to see what I can get
20 accomplished before I leave.

21 MR. BERK: Agreed, your Honor.

22 THE COURT: If we have to move this to Thursday
23 morning, we can move it to Thursday or some other day. I just
24 have a busy day on Thursday.

25 Mr. Ind, I want to thank you for coming in. And if

1 you need to come back, you're welcome to come back, but
2 hopefully we can deal with this.

3 MR. IND: Thank you, your Honor. Appreciate it.
4 Thank you.

5 THE COURT: Okay. Let's pass this for a second.

6 (Whereupon the Court turned his attention to other matters
7 on his call.)

8 THE CLERK: 11 C 1089, The Tucker Firm, LLC versus
9 Alise.

10 THE COURT: Why don't you state your appearances
11 again.

12 MS. TUCKER: Debra Tucker on behalf of the plaintiffs.

13 MR. BERK: Peter Berk on behalf of Kimberly Alise.

14 MR. FLYNN: George Flynn on behalf of McDonald
15 Hopkins, LLC and its individual attorney respondents.

16 THE COURT: Okay. What have you noticed for
17 the -- for Thursday?

18 MS. TUCKER: Your Honor, that is our motion to compel
19 Alise's responses to our first set of interrogatories, our
20 document requests, a separate motion, motion to compel her to
21 produce documents in response to our document requests, and the
22 motion to compel the Guterman parties, who are Dr. Guterman
23 himself, ECDS, and Malo.

24 THE COURT: Okay.

25 MR. BERK: Your Honor, may I briefly comment on two of

1 those motions?

2 THE COURT: No.

3 MR. BERK: Okay. They may in fact (unintelligible).

4 THE COURT: Okay. Well, then briefly comment.

5 MR. BERK: The motion to compel Ms. Alise to respond
6 to interrogatories and document requests we believe is
7 premature. The interrogatories -- I had a 37.2 conference with
8 Ms. Pavely, one of Ms. Tucker's associates, I believe, last
9 week, and offered to get back to her by tomorrow with certain
10 additional information. Without waiting for that they filed
11 their motion. I don't believe that's in the spirit or in
12 compliance with 37.2.

13 The motion on the document request, I have offered the
14 date of May 16th when they noticed the motion for the 37.2
15 conference. We haven't had that conference yet, and yet they
16 are bringing a motion. I think that's premature.

17 MS. TUCKER: Your Honor, in the motions itself we
18 specifically address the compliance with 37.2. So I would ask
19 that you read that before you decide whether they have in fact
20 complied or not complied with 37.2. I believe that we have
21 fully complied.

22 This is one of Berk's persistent tactics to prevent us
23 from filing motions to compel. That is why we are here at
24 nearly the end of the close of discovery without any discovery
25 because Mr. Berk objects to us coming to the Court with tactics

1 like this, of future promises of performance that never in fact
2 materialize.

3 MR. BERK: Your Honor, that's -- that's --

4 THE COURT: No, no, no. Please stop.

5 The only motion that I read was the motion to compel
6 Alise to respond to interrogatories. I did not read the motion
7 to compel document requests responses, and I have not looked at
8 the Guterman motions, the motion to compel the Guterman
9 parties.

10 However I did look at Alise's responses to the revised
11 interrogatories served by Tucker. And my review of those
12 responses to interrogatories by Alise tells me that Alise's
13 responses to those interrogatories are sorely lacking in
14 detail. I think the objections by and large are not well
15 founded.

16 I think that, Mr. Berk, you need, if you are going to
17 have a meet and confer, to go back and look at the rules of
18 discovery, including the rule, I think, that requires your
19 client actually to sign answers to interrogatories.

20 Your Answer to Interrogatory Number 1, for example,
21 asks for an identification of all people with knowledge, and
22 you reference your 26(a)(1) disclosures, which, by definition,
23 do not identify everybody with knowledge, they identify people
24 that you are going to -- whose testimony you would say supports
25 your claims and defenses.

1 MR. BERK: And that's one of the issues we discussed
2 with Ms. Pavely, and I'll -- and one of the concerns we had,
3 which I raised with Ms. Pavely is, we believe that some of the
4 discovery that the plaintiff has undertaken goes well beyond
5 the scope of reasonableness of this case. And I know there is
6 a dispute about that.

7 My concern that I raised with Ms. Pavely was, they
8 would use that answer as saying, see, all these people are
9 relevant. And that was my concern. Ms. Pavely suggested that
10 we do our answer indicating that, you know, these are knowledge
11 and without waiving the (unintelligible) disclaimer language in
12 there, and I said, that's definitely a consideration. I would
13 consider doing that. I will get back to you by the 15th, which
14 we're going to do.

15 THE COURT: It is --

16 MR. BERK: And that's what I intend to do on the 15th.

17 THE COURT: That is a silly discussion as far as I'm
18 concerned. And I realize I'm saying this on the record and
19 somebody could write this but -- and I use that word advisedly,
20 okay? Of course the plaintiff is going to say that if you
21 identify somebody with knowledge, it is relevant, okay? That's
22 the plaintiff's position. The defendant may disagree. But it
23 is an appropriate interrogatory to ask people with knowledge.
24 I think it is an inappropriate response to say, see my 26(a)
25 disclosures, and investigation continues. I just don't think

1 that works. Okay?

2 You -- this is an example of what I think is the
3 unnecessary fighting in this case. Do you have a trial date in
4 this case yet?

5 MR. BERK: We do not, your Honor.

6 THE COURT: The second interrogatory -- I mean, at
7 issue in this case in the counterclaim is whether Tucker's fees
8 for the underlying divorce and business dispute were
9 appropriate. Right?

10 Right, Mr. Berk?

11 MR. BERK: Yes, your Honor.

12 THE COURT: Okay. And Alise says that Tucker billed
13 too much, right?

14 MR. BERK: Yes, your Honor.

15 THE COURT: And Interrogatory Number 2 asks you to
16 specify what's too much. I think it is a legitimate question.
17 All right? It may require a huge -- a lot of response, a long
18 response. That's because your counterclaim says Ms. Tucker's
19 bill is outlandish, outlandishly large. She shouldn't have to
20 wait till trial to hear what you have to say about it. And all
21 you say is discovery is ongoing, it is overly burdensome, it is
22 premature.

23 It is not premature. You filed a counterclaim. All
24 right? And so I look at a lot of these responses here, list
25 all distributions that Alise and/or Guterman received at any

1 time as an alleged owner of Malo or ECDS. Now I think one of
2 the points that Tucker is making is that Alise got some
3 financial benefit from these underlying settlements and
4 whatever. I'm not weighing into it necessarily. But
5 you're -- you don't answer at all because you say distribution
6 is undefined.

7 MR. BERK: And we discussed that in the conference
8 calls that our answer will be supplemented. That's the point
9 I'm making, your Honor. The -- the view from Ms. Pavely was
10 that a distribution is much broader than what we would consider
11 distribution. We wanted to understand that. She explained
12 that what -- we disagree with what her definition is, but we're
13 certainly going to look at supplementing that answer based on
14 what we discussed.

15 My problem is, your Honor, that they see a 37.2
16 conference as a mere stopover from filing a motion to compel.
17 I have been on the phone with Ms. Pavely and Mr. Saikely, who
18 was in the case before, I don't know if he is still in the case
19 or not, where I have asked for -- try to make reasonable
20 compromises, try to deal with these things, and the response I
21 basically get is, well, I can't agree to that, and I have no
22 authority to agree to that, and basically give me everything
23 I'm asking for or that's it. And there is just no effort to
24 have a good faith compromise. And what I think shows the lack
25 of restraint is that this filing a motion on documents prior to

1 even having a conference. And I think that's problematic, your
2 Honor.

3 THE COURT: I'm not talking about documents, I'm
4 talking about interrogatories.

5 Is Alise either -- does Alise own equity, either
6 limited partnership interest or stock in either Malo or ECDS?
7 Or did she at some point relevant to these proceedings?

8 MR. BERK: At some point relevant she did. There can
9 be a dispute as to whether her current interest actually
10 constitutes equity or true stock.

11 THE COURT: Okay. But to me then this objection
12 about, I don't know what a distribution means, may very well
13 not be well founded because, because if somebody owns an equity
14 interest and there is money that comes out of the entity to the
15 person who owns the equity interest as either a dividend or
16 some other type of distribution on that equity interest, I
17 think you can answer the interrogatory. You can object to it.
18 But don't you think that's what they are asking about?

19 MR. BERK: Your Honor (unintelligible) pull that up
20 because here --

21 MS. TUCKER: Your Honor --

22 THE COURT: It is Number 4.

23 MS. TUCKER: Your Honor, to be very clear, there is
24 a --

25 MR. BERK: Can I --

1 MS. TUCKER: There is an alleged parent company and an
2 alleged subsidiary. Alise in her own pleading claimed that
3 she's only an owner of the LLC, Malo the Dog, LLC. Under the
4 Limited Liability Company Act, the word distribution, interim
5 and final distribution, is used. So the definition of
6 distribution that we're talking about here is for the word, the
7 legal word distribution. It is a legal word, and it is defined
8 under the Limited Liability Company Act. There should be no
9 confusion over what that word means.

10 THE COURT: Okay. I'm not going to --

11 MR. BERK: I have to correct something in the record,
12 and I apologize for interrupting your Honor.

13 Ms. Pavely's definition that she discussed with me on
14 the phone is completely different than that. And in answering
15 under the -- what we understood to be a distribution, we
16 actually answered. Subject to and without waiving those
17 (unintelligible) none. Ms. Pavely asserted to me that a
18 distribution means any payment, whether it is salary, whether
19 it is a health benefit, whether it is payment of insurance,
20 whether it is anything is a distribution. I don't think that's
21 right, but we answered it based on the understanding of
22 distribution, at least our understanding of it, what it is
23 defined as as none.

24 We did answer that interrogatory. They disagree.

25 They believe that any payment to her, whether it is salary,

1 whether it is whatever, it is a, quote unquote, distribution.

2 MS. TUCKER: Your Honor, to be clear, that information
3 that Mr. Berk is speaking about is requested in other
4 interrogatories. This interrogatory is very specific as it
5 says, as an alleged owner of Malo or ECDS this -- this
6 interrogatory is perfectly clear. There is nothing vague and
7 ambiguous about that.

8 THE COURT: Okay. But he says subject to all of his
9 objections, and I'm not sure exactly what that means, the
10 answer is none.

11 We have to stop because Mr. Berk has a personal
12 commitment. And so I need to have you come back. My purpose
13 in at least delving into the interrogatories was to, A, give
14 you a preview of some of my thoughts; and, B, to highlight the
15 fact that if these kinds of disputes are going to continue,
16 there is going to be some burden shifting. There is going to
17 be some cost shifting. Okay?

18 I mean, I understand what you are saying about
19 Interrogatory Number 4. But when I look at these answers to
20 interrogatories, it is -- some of them in my mind are
21 obfuscatory. And some of the information that is requested is
22 relevant or likely to lead to the discovery of admissible
23 evidence. It should be in the defendant's, counterplaintiff's
24 possession. You're well into discovery. And I think that
25 plaintiff has a point here with respect to some of the

1 information she is seeking and the limited summary responses
2 that the defendant/counterplaintiff is providing. I
3 don't -- I -- there may be -- there may be issues that are
4 legitimate here, but they are not as legitimate as I see your
5 answers to interrogatories being, and I think that you're going
6 to need to deal with that.

7 MR. BERK: And, your Honor, we did that -- we'll take
8 that comment and go back, as we intended to do, as we discussed
9 with Ms. Pavely at the 37.2.

10 THE COURT: All right.

11 MR. BERK: I have no problem doing that.

12 THE COURT: Look, you guys are scheduled on my motion
13 call on Thursday, and I have like eight motions on that 9:15
14 call. It is going to be impossible to deal with you
15 substantively there. Can you come in instead at 11:00 where I
16 could actually have maybe an hour with you?

17 MS. TUCKER: Yes, your Honor.

18 MR. BERK: Yes, your Honor.

19 THE COURT: And my goal at that is to figure out a
20 schedule for resolving some things that actually need to be
21 resolved, set them on the calendar for hearing, discuss -- I'll
22 have a chance to maybe look a little bit more at some of this,
23 for example, Tucker's motions to compel on -- your motions to
24 compel Tucker to respond to certain things, and see whether or
25 not I think they are subject to the same deficiencies. But I

1 would like to set a definitive schedule as to when we're going
2 to get things resolved and how we're going to get things
3 resolved at that time. Okay?

4 MR. BERK: Yes.

5 THE COURT: So I could spend about an hour at 11:00 or
6 a little bit more. Okay?

7 MR. BERK: Yes, your Honor, that's fine.

8 THE COURT: Okay.

9 MS. TUCKER: Okay.

10 THE COURT: And you're going to be here too, Mr.

11 MR. FLYNN: Flynn.

12 THE COURT: -- Flynn?

13 MR. FLYNN: Your Honor, I probably won't be here that
14 morning. My partner Richard Kaplan will likely be here.

15 THE COURT: Okay.

16 MR. FLYNN: I do -- at the risk of delaying Mr. Berk,
17 if I could have a minute and a half, I do have an issue I need
18 to bring to the Court's attention reluctantly. I do not
19 have a motion on this issue, but this is such a basic and
20 fundamental principle I don't think it is necessary, and I
21 think the Court will agree.

22 I have been retained to represent McDonald Hopkins,
23 the firm, as well as its individual attorneys for purposes of
24 responding to discovery and defending their depositions in this
25 case. I have also been retained to defend the firm when

1 Mr. Berk or Mr. Steve Harris in the state court action which
2 Ms. Tucker filed on May 1st. One of the counts is contribution
3 arising out of this very malpractice counterclaim from this
4 case.

5 In connection with my representation I have on four
6 occasions in writing and one occasion yesterday during a 37.2
7 conference advised The Tucker Firm to refrain from contacting
8 my clients directly, with the exception of Mr. Berk,
9 Mr. Kessler, and Mr. Jacobi because they are handling the
10 litigation on behalf of Ms. Alise.

11 Ms. Tucker's colleagues have refused to acknowledge my
12 request pursuant to Rule 4.2. And I have suggested that I
13 would take necessary actions, which I reluctantly will take.

14 But I am requesting that the Court instruct Ms. Tucker
15 and her firm to refrain from contacting my clients whether by
16 letter, email, phone call or even a copy of the letter, with
17 the exception of Mr. Berk, Kessler, and Mr. Jacobi.

18 THE COURT: Okay. I don't know how you want me to
19 deal with this in a minute and a half. I want to respect
20 Mr. Berk's need to get to a funeral.

21 MR. FLYNN: I understand.

22 THE COURT: If your partner is going to be here on
23 Thursday, he can raise this. If you have a motion to file, but
24 you're not a party really -- although you are -- I don't know.

25 MR. BERK: He's a third-party respondent.

1 THE COURT: You know what, and I don't know what
2 Ms. Tucker's response to this is. I don't -- I'm not going to
3 weigh in right now, I'm just not.

4 So I'm going to let Mr. Berk go to his appointment.
5 I'm sorry that --

6 MR. BERK: Your Honor --

7 THE COURT: -- you waited to the end to raise this.
8 But if you can't work this out, I'll deal with it.

9 MR. FLYNN: Understood.

10 MR. BERK: I might suggest if I am not necessary for
11 any more with this issue, Mr. Flynn can handle it and I can
12 still leave --

13 THE COURT: Oh, okay.

14 MR. FLYNN: Absolutely.

15 THE COURT: Fine.

16 MR. BERK: That's perfectly fine with me, your Honor.

17 THE COURT: Fine. Go.

18 MR. BERK. Thank you.

19 MR. FLYNN: And, your Honor --

20 MR. BERK: Appreciate it, your Honor.

21 MR. FLYNN: -- I make a living representing
22 attorneys. And the last thing I want to do is contact the ARDC
23 or, you know, in federal court the Chief Judge to report
24 misconduct.

25 THE COURT: So what you are saying simply is that you

1 are counsel for a represented party or parties. You have
2 requested that the opposing party communicate with those
3 represented parties only through you or a member of your law
4 firm because you are counsel for these parties.

5 MR. FLYNN: Yes, with the exception of --

6 THE COURT: The people who are litigating this case
7 where it would be unnatural for them to communicate with you on
8 that.

9 MR. FLYNN: Absolutely.

10 THE COURT: Okay.

11 MS. TUCKER: Your Honor, what he's trying to do is to
12 prevent us from speaking to our opposing counsel. For
13 example -- yes, he is.

14 For example, Ms. Jenny McGovern has been -- she is an
15 attorney with McDonald Hopkins. She is -- has participated
16 voluntarily, not at our request, in 37.2 conferences
17 representing Ms. Alise. This is one of the attorneys that
18 Mr. Flynn claims that I am violating the Rules of Professional
19 Conduct by copying letters and apparently by talking to her in
20 a 37.2 conference that she voluntarily participated in.

21 He might represent them with respect to discovery
22 directed to them, and I am communicating on those matters with
23 Mr. Flynn, and not these people. But they are opposing counsel
24 in this case. I have to communicate with my opposing counsel
25 in this case and not some third party who represents them in

1 another case. I have only directed my communications to
2 lawyers at McDonald Hopkins who are representing actively
3 Ms. Alise.

4 Might I suggest that any people that are doing that
5 simply file appearances? For example, Ms. Jenny McGovern, she
6 is an attorney at McDonald Hopkins. She is working for
7 Ms. Alise on this case. So for clarity it would be helpful if
8 they would just put her appearance on file, and then there is
9 no dispute that I am entitled to communicate with her. She has
10 participated on 37.2 conferences. It is not a violation of the
11 Professional Rules of Conduct for me to -- for the lawyers in
12 my firm to talk to a lawyer that they put on the phone in a
13 37.2 conference with respect to matters that don't involve the
14 state case that (unintelligible) a 37.2 conference on discovery
15 that is unrelated to discovery directed to McDonald Hopkins.

16 It is not my problem that they have entered --

17 THE COURT: Time out. Time out.

18 MS. TUCKER: -- conflicting representation.

19 THE COURT: Time out. I get it.

20 What's your response?

21 MR. FLYNN: Judge, it is a violation of the rules
22 after I have advised them not to contact my clients. Now Jenny
23 McGovern is not going to be involved in any more of those 37.2
24 conferences.

25 THE COURT: But was she?

1 MR. FLYNN: Was she in the past?

2 THE COURT: Yeah.

3 MR. FLYNN: I believe so.

4 THE COURT: Okay. Look, I think what you are
5 saying -- I mean, this, again, I think rises to the level of --
6 or falls to the level of silliness. From what I understand
7 from Mr. Flynn, what you are saying is McDonald Hopkins is
8 representing the defendant and counterplaintiff in this case.
9 Right?

10 MR. FLYNN: Yes.

11 THE COURT: And there are attorneys at McDonald
12 Hopkins that are participating in that representation, right?

13 MR. FLYNN: There are three that have filed
14 appearances in this case.

15 THE COURT: Okay. But I'm -- but that's a weasel
16 word, okay? That's a weasel word. It happens all of the time
17 that somebody may not have technically an appearance on file,
18 but might -- an associate, for example, or a partner might
19 write a letter that says, we object to these discovery
20 requests. Might be on a phone call. And I -- what I heard you
21 saying to me at the beginning was that you understand that it
22 is not a violation of the professional responsibility rules for
23 Ms. Tucker to communicate with lawyers from McDonald Hopkins
24 who are actually involved in this litigation representing a
25 client.

1 What you want to avoid is that to the extent that the
2 people you represent are either responding to subpoenas or are
3 parties in some other case and you are representing them with
4 respect to those matters, that all communications with respect
5 to those matters which do not touch the lawyers or staff's
6 representation of Alise in this case, those communications
7 should go through you, right?

8 MR. FLYNN: The communications regarding this case --

9 THE COURT: Uh-huh.

10 MR. FLYNN: -- can go through the three attorneys. I
11 think that's sufficient. There are three --

12 THE COURT: But, wait. Whoa, whoa, wait. Was
13 McGovern on the phone with Tucker in a 37.2 conference? Yes or
14 no.

15 MR. FLYNN: At some point in the past, yes.

16 THE COURT: Okay. And are you saying that Tucker's
17 communication with McGovern because she does not have an
18 appearance on file in this case violates some rule?

19 MR. FLYNN: No --

20 THE COURT: Okay.

21 MR. FLYNN: -- not at all.

22 MS. TUCKER: Your Honor, he has written me a letter
23 saying --

24 MR. FLYNN: That is not --

25 MS. TUCKER: -- precisely that. That my

1 communications with Ms. Jenny McGovern violate the Professional
2 Rules of Conduct, and he's going to have to report me to the
3 ARDC.

4 MR. FLYNN: Going -- going forward. I did not say I
5 was going to report her to the ARDC

6 MS. TUCKER: Oh, I'm sorry.

7 THE COURT: Well, that would be silly.

8 MS. TUCKER: He said to the applicable authorities.

9 THE COURT: Okay. You know what --

10 MR. FLYNN: Judge --

11 THE COURT: Her --

12 MR. FLYNN: Going forward --

13 THE COURT: Time out. Time out.

14 MR. FLYNN: I'm sorry.

15 THE COURT: Time out.

16 Ms. Tucker's -- I'm not resolving any motion here.

17 Okay? I'm just sitting as a mediator of this silly dispute.

18 Okay?

19 A bright -- it sounds like everybody needs a bright
20 line here. I think Ms. Tucker's solution to this is not a bad
21 solution, which is that if there are attorneys at McDonald
22 Hopkins who are involved in representing Alise in this case,
23 and therefore you do not object to Ms. Tucker talking to those
24 people directly as in her role as counsel for Tucker in this
25 case, I suggest they get an appearance on file.

1 MS. TUCKER: But, your Honor --

2 THE COURT: Hold on. Hold on.

3 MS. TUCKER: -- what he's going to do is not file
4 those appearances.

5 THE COURT: What?

6 MS. TUCKER: Like Jenny McGovern, he just won't file
7 that appearance, and she will continue to work on the case
8 and --

9 MR. FLYNN: Ms. Tucker has filed a state court action
10 to create these conflicts.

11 THE COURT: You know, I -- you know what, I have been
12 around this block before. I think it makes a lot of sense for
13 McDonald Hopkins to have hired separate counsel either to
14 respond to subpoenas in this case or for any other issues that
15 have to exist.

16 To me -- I'm not getting it, Mr. Flynn. If -- I'm not
17 hearing Ms. Tucker say that she is wanting to communicate with
18 attorneys or staff at McDonald Hopkins who aren't -- who are
19 not engaged in conduct or activity in representing Alise in
20 this case. I'm just not hearing her say that. Okay?

21 And if we're talking about this McGovern person and
22 she actually did participate in communications relating to the
23 merits of this case or discovery of this case, and what you are
24 now saying is she's not going to be doing so in the future and
25 so therefore Ms. Tucker should not have any reason to speak to

1 her about this case in the future, my guess is she doesn't have
2 any problem with that.

3 MR. FLYNN: And Ms. Tucker has subpoenaed
4 Ms. McGovern. And I am representing Ms. McGovern for that
5 purpose, so I don't want her to talk to her about that.

6 MS. TUCKER: Your Honor, we have not --

7 THE COURT: What about whether -- how are you going
8 to -- and what is the subject matter of the subpoena?

9 MR. FLYNN: Essentially everything involving the
10 underlying case.

11 THE COURT: In the underlying case, meaning the
12 divorce and business dispute or this litigation, Number 11 C
13 1089?

14 MR. FLYNN: Well, it is my understanding it is the
15 divorce and business litigation which is the matter of the
16 legal malpractice counterclaim. So it is all intertwined.

17 They filed a contribution action in state court which
18 is baffling to me because --

19 THE COURT: How do you propose -- how do
20 you -- Mr. Flynn, how do you propose if -- I understand Harris,
21 Kessler, and Berk you're taking out of that. Right? She can
22 talk to these people.

23 MR. FLYNN: No, Berk, Jacobi and Kessler.

24 MS. TUCKER: And precisely the point, he says I can't
25 even talk to Mr. Harris. Mr. Harris has been here before your

1 Honor. Mr. Harris is (unintelligible) --

2 MR. FLYNN: He's not anymore.

3 MS. TUCKER: -- settlement --

4 MR. FLYNN: I'm telling him to stay out of this. He's
5 my client. He's entitled to representation. And I have got to
6 protect him.

7 I also want to protect him from the harassing letters
8 that come at 9:00, 10:00 o'clock at night every night. I'll
9 get -- Mr. Makee, who is the in-house counsel in Cleveland,
10 does not need to be communicated with by Ms. Tucker. That is
11 my job.

12 MS. TUCKER: Your Honor --

13 THE COURT: I have -- I have had Mr. Harris here on a
14 number of occasions representing Alise and Mr. Guterman. He
15 participated in settlement discussions directly with
16 Ms. Tucker, directly with me, directly with Ms. Tucker's
17 counsel. And, you know, I'm loathe to wade in -- I mean, I'm
18 having trouble understanding what the issue is here. I don't
19 know anything about the state court litigation. This seems
20 very confusing to me.

21 MR. FLYNN: It is, your Honor. But Mr. Harris has
22 tendered -- as -- (unintelligible) insurance carrier. They
23 have hired me to represent him and protect him.

24 THE COURT: Uh-huh.

25 MR. FLYNN: And so --

1 THE COURT: So if I have a settlement conference in
2 this case, is Harris going to show up?

3 MR. FLYNN: Probably not.

4 MS. TUCKER: And, your Honor, Mr. --

5 MR. FLYNN: And if he does and if I give consent for
6 Ms. Tucker to contact -- or communicate with him at that point
7 in time, I think the rules allow that. That's my prerogative
8 as his lawyer.

9 MS. TUCKER: Your Honor --

10 THE COURT: So you're going to be the arbiter of when
11 Ms. Tucker can talk to your client and when not?

12 MR. FLYNN: I think that's what Rule 4.2 allows, yes.

13 THE COURT: Uh-huh.

14 MS. TUCKER: Your Honor, they are opposing counsel.
15 Mr. Harris --

16 MR. FLYNN: But she has sued them --

17 MS. TUCKER: Mr. Harris is calling Mr. Saikely about
18 settlement. So is Mr. Saikely violating the professional rules
19 too? I mean, Mr. Harris has been here representing Ms. Alise.
20 He is our opposing counsel. We have only communicated with
21 those McDonald Hopkins lawyers who have actively participated
22 in Ms. Alise's representation in the underlying -- in this
23 case. They are our opposing counsel, every single one of them
24 that we have had communications.

25 And, by the way, we are not calling them up by phone.

1 What he's talking about is copying them on letters because the
2 only communications that ever happen in this case are either an
3 official 37.2 conferences or are by letter. And we are not
4 randomly calling his clients, we are calling -- we are copying
5 people on letters that are opposing counsel and we have good
6 information that they are in fact representing Ms. Alise with
7 respect to this loss of (unintelligible) are opposing counsel.
8 We have an obligation, not just a right, we have an obligation
9 to speak to our opposing counsel in this case.

10 MR. FLYNN: Your Honor, there is a reason why this is
11 such an important point to me. And I have personally listened
12 to a voicemail message that Mr. Berk -- unfortunately he had to
13 leave but he has on his phone and I guarantee that he will play
14 for you on Thursday -- is a voicemail message from Ms. Tucker
15 to Dr. Seth Guterman where she acknowledges his representation
16 by counsel and yet communicates with him substantively.

17 MS. TUCKER: Your Honor, I have a letter from Mr. Berk
18 saying that they don't represent Dr. Guterman. I would be
19 happy to tender that to the Court.

20 Then they said they represented Dr. Guterman with
21 respect to some matters and not others. So it is entirely
22 confusing who McDonald Hopkins represents when. They change
23 their position constantly.

24 When that phone call was made, I had a letter that
25 Mr. Berk expressly wrote that said that they did not represent

1 Dr. Guterman. So now they claim I violated the ARDC rules.

2 THE COURT: Does McDonald Hopkins currently represent
3 Dr. Seth Guterman?

4 MR. FLYNN: I believe they represent him for certain
5 purposes, yes.

6 THE COURT: Do they represent -- does McDonald Hopkins
7 represent Dr. Seth Guterman as a third-party witness being
8 subpoenaed in this case?

9 MR. FLYNN: I don't know if that's been determined,
10 Judge.

11 THE COURT: All right. So how do you -- does McDonald
12 Hopkins represent Dr. Guterman as a interested party in the
13 case of Tucker versus Kimberly Alise, 11-1089?

14 MR. FLYNN: I'm not sure -- I really don't know the
15 answer to that question.

16 MS. TUCKER: Your Honor, we have --

17 MR. FLYNN: But Dr. Guterman --

18 MS. TUCKER: -- letters --

19 MR. FLYNN: -- has been sued in the state court
20 action. Will they represent him in that case?

21 THE COURT: Are you -- are you representing Guterman
22 in the state court case?

23 MR. FLYNN: I am not.

24 THE COURT: Okay. So give me a clue here --

25 MR. FLYNN: When an attorney calls and says,

1 Dr. Guterman, this is Debra Tucker, your lawyers lost the big
2 motion today, what she's doing is acknowledging that there is a
3 representation. Now this was not today, it was not yesterday,
4 it was at some point in the past where she presumably believed
5 that Mr. Guterman, Dr. Guterman was represented. And that is
6 the point, she knows of the representation, and yet she is
7 abusing and contacting represented parties.

8 All I'm saying is for purposes of this litigation, if
9 she needs to contact McDonald Hopkins attorneys, I'm allowing
10 her to contact three of them. The rest of them are my
11 clients. I'd like to keep my clients under my control.

12 MS. TUCKER: Your Honor, I can -- I'm sorry to
13 interrupt, but I cannot let these allegations of professional
14 misconduct stand unrefuted on the record.

15 When I called Dr. Guterman, I had in my possession a
16 letter from Mr. Berk that said in no uncertain terms that
17 McDonald Hopkins does not represent Dr. Guterman. McDonald
18 Hopkins has historically, for years and years, been
19 Dr. Guterman's lawyers. So when I said in this voicemail, your
20 lawyers lost a big motion today my reference was that these are
21 generally and have been in the past Dr. Guterman's lawyers. At
22 some point they apparently abandoned that representation and
23 they notified me of that in writing.

24 Since that time they have been -- said they
25 represented Dr. Guterman with respect to certain issues and not

1 others. And I have repeatedly asked them in correspondence to
2 identify precisely what matters they represent Dr. Guterman in
3 and precisely which matters they don't represent Dr. Guterman
4 in so that I know how to comply with my professional
5 obligations to not communicate with a represented party.

6 I have not committed any ethical violations. And even
7 if I had, this is not the appropriate forum for Mr. Flynn to be
8 raising these disputes. He doesn't even represent
9 Dr. Guterman. And he's complaining about my communications
10 with Dr. Guterman.

11 MR. FLYNN: This is a pattern, Judge. I have not
12 abandoned any representation. I'm instructing her not to
13 contact my clients.

14 THE COURT: And your client is McDonald Hopkins, LLC
15 and its personnel.

16 MR. FLYNN: Correct.

17 THE COURT: And you have got an appearance on file in
18 this case on behalf of McDonald Hopkins, LLC, as something
19 called respondent. And is that as a respondent to a third-
20 party subpoena served on it?

21 MR. FLYNN: Yes. As well as notices for deposition
22 for individual attorneys. I believe there are about five of
23 them if I am not mistaken, Judge.

24 THE COURT: Okay. And do you represent McDonald
25 Hopkins in this other state court litigation?

1 MR. FLYNN: I do. They were -- the lawsuit was just
2 filed served on May -- I'm sorry -- filed on May 1st

3 THE COURT: Uh-huh.

4 MR. FLYNN: And they were served. So I will be filing
5 an appearance and a responsive pleading for McDonald Hopkins,
6 Steve Harris, and Peter Berk.

7 THE COURT: And so what you are requesting is that --
8 but your status in this case is representing McDonald Hopkins
9 as the recipient of a third-party subpoena from the plaintiff.

10 MR. FLYNN: Yes.

11 THE COURT: Okay. And so what you are requesting is
12 that -- I mean, it seems to me what you have standing to
13 request before me is that Ms. Tucker not contact individual
14 attorneys at McDonald Hopkins relating to the matters in the
15 third-party subpoena. Right? I mean, isn't that what you have
16 standing to do?

17 MR. FLYNN: It is. But the third-party subpoenas
18 again arise out of this counterclaim for legal malpractice.

19 THE COURT: Uh-huh.

20 MR. FLYNN: And the legal malpractice counterclaim is
21 the tort, which is the basis for the contribution action in
22 state court.

23 THE COURT: Uh-huh.

24 MR. FLYNN: So all of these issues are related.

25 THE COURT: Well, they are related, but you are

1 representing McDonald Hopkins in this case --

2 MR. FLYNN: Yes.

3 THE COURT: -- as a respondent to a third-party
4 subpoena seeking certain information.

5 MR. FLYNN: Correct.

6 THE COURT: Seems to me that it is at least legitimate
7 for you to say to Ms. Tucker, if you want information covered
8 by that third-party subpoena to my client, then your
9 communications about that third-party subpoena should be
10 directed to me, George Flynn --

11 MR. FLYNN: Yes.

12 THE COURT: -- because I am counsel McDonald Hopkins,
13 LLC. Okay?

14 To the extent though you are saying more broadly you
15 don't want Ms. Tucker to contact anybody at McDonald Hopkins
16 about anything related to this case, like when are you going to
17 respond to -- when is your client going to respond to
18 discovery, or can we enter into a briefing schedule on a motion
19 to compel, or can you clarify your answer to Interrogatory
20 Number 4, sounds to my me like that's beyond the scope of your
21 representation of this client, unless you're going to say that
22 I represent this client for any and all purposes and I'm going
23 to unilaterally decide who she can talk to, who Ms. Tucker can
24 talk to about something and who she can't. Okay?

25 And I'm not sure where you get off saying that,

1 frankly, because I don't have federal -- Rule 4.2 of the Rules
2 of Professional Responsibility in front of me, but I think it
3 says, a lawyer can't communicate with a represented client and,
4 I think, about the matters that are subject to that
5 representation. Right? Or is it --

6 MS. TUCKER: If -- and it also says, without consent
7 or as otherwise permitted. The language is something similar
8 to that.

9 They are opposing counsel. And just to be clear, even
10 with respect to, for example, the notices -- the subpoenas for
11 their deposition, Ms. Alise's counsel has to be involved in
12 that because, for example, we have to schedule the dates of
13 those. Ms. Alise's counsel is entitled to be present for those
14 depositions.

15 THE COURT: Uh-huh.

16 MS. TUCKER: So even to stay that we cannot contact
17 them about -- Ms. Alise's counsel about discovery to a third
18 party is improper.

19 Another example, we have to give Ms. Alise's counsel
20 notice before we serve a subpoena for documents. How are we
21 supposed to give that notice to Ms. Alise's counsel if I cannot
22 provide that notice, according to Mr. Flynn, because I have got
23 to send that to Mr. Flynn? How am I supposed to comply with
24 the Federal Rules?

25 THE COURT: But is there -- he's --

1 MR. FLYNN: I thought I was being reasonable about it.

2 THE COURT: He said you could send a notice to

3 Mr. Berk. He is suggesting that you send a notice to Mr. --

4 MS. TUCKER: He is not --

5 THE COURT: -- Berk. He's saying that for clarity
6 purposes that with respect to matters in this litigation, you
7 can communicate with Mr. Berk, Jacobi, and --

8 MR. FLYNN: Kessler.

9 THE COURT: -- Kessler. Okay?

10 Which is interesting to me because the last time I was
11 involved Harris was pretty much involved. Okay?

12 But putting that aside, you're saying that right now,
13 given the current state of affairs, those are the three people
14 who are handing this litigation.

15 MR. FLYNN: Correct.

16 THE COURT: Okay? And what you are saying further is
17 that there is nobody else at Hopkins who is going to
18 communicate with Ms. Tucker about this litigation, 11 C 1089.

19 MR. FLYNN: Not without my permission, Judge. That's
20 what I am trying to get control of here.

21 MS. TUCKER: So we're not to talk to Mr. Harris about
22 settlement according to Mr. Flynn.

23 MR. FLYNN: That's right.

24 THE COURT: Yeah. That's what's he's saying.

25 MR. FLYNN: Because --

1 MS. TUCKER: Because you sued them and because they
2 are a third-party deponent.

3 But, P.S., unless you have made a whole lot of
4 progress since the last time you were in front of me, I'm not
5 sure what kind of discussions are going to be productive with
6 Mr. Harris about settlement.

7 MS. TUCKER: Mr. Harris has been calling Mr. Saikely
8 so --

9 THE COURT: Okay. But --

10 MR. FLYNN: I called Mr. Saikely myself, and that's my
11 role, and I don't want Steve Harris to call him anymore.

12 THE COURT: Okay.

13 MR. FLYNN: -- that's what I am trying to do, Judge.

14 THE COURT: Okay. But if your client picks up the
15 phone and calls either Ms. Tucker or Mr. Saikely --

16 MR. FLYNN: He won't.

17 THE COURT: Well, he has. Okay?

18 MS. TUCKER: And represents Ms. Alise.

19 MR. FLYNN: I was just recently retained though.
20 That's not my point is that I am trying to explain that going
21 forward she's not to contact them.

22 THE COURT: Okay. Well, look, I don't how far to wade
23 into this. I don't know even know what the state court
24 complaint is. Okay?

25 I mean, Ms. Tucker, what I will tell you is that you

1 got to walk on the rocks in the river here. Okay? And I don't
2 pretend to know where all those rocks are. But to the extent
3 that McDonald Hopkins now has counsel as a third-party deponent
4 or recipient of a subpoena in this case or a defendant in the
5 case in state court, prudence would dictate that you
6 communicate with counsel for that represented party with
7 respect to those matters.

8 MS. TUCKER: And we do. But there are certain
9 situations where we have to communicate with them as opposing
10 counsel. And I have given examples. We have to give notices
11 of a subpoena. We have to coordinate the deposition schedule.
12 When somebody is on a 37.2, we can't kick them off the 37.2.

13 THE COURT: But I think -- right. And I think what
14 Mr. Flynn is saying is, if you have got a notice for a
15 deposition or you got a document to serve, it should go to
16 Berk, Jacobi or Kessler. All right?

17 Right, Mr. Flynn?

18 MR. FLYNN: Exactly.

19 MS. TUCKER: With respect to McDonald Hopkins's
20 subpoenas.

21 THE COURT: No, with respect to anything involving the
22 litigation of the case number of 11 C 1089.

23 Okay. With respect -- and if you are subpoenaing or
24 noticing the deposition of Dr. -- of Hopkins -- of McDonald
25 Hopkins in this case, so it is a notice of deposition in 11 CV

1 1089, and McDonald Hopkins is representing Alise in this case
2 and therefore is entitled to notice of a deposition of any
3 third party, including McDonald Hopkins, that notice of
4 deposition should go to Berk, Jacobi or Kessler and to Flynn
5 because it involves his separate client. Okay?

6 It is not confusing here. This is not confusing. All
7 right?

8 To the extent, Mr. Flynn, that somebody other than
9 Berk, Kessler or Jacobi gets on the phone in the 37.2
10 conference or sends Ms. Tucker a letter saying, we object to
11 discovery or anything relating to the ongoing litigation of 11
12 C 1089, therefore have inserted themselves in representing
13 Alise, I guess I don't see anything improper right now with
14 Ms. Tucker communicating with that person who communicates at
15 their instance.

16 You're going to try and stop that --

17 MR. FLYNN: I would agree with you.

18 THE COURT: You're (unintelligible) out of luck.

19 MR. FLYNN: Yeah, I would agree with your analysis.

20 THE COURT: All right. So --

21 MS. TUCKER: Wait. So to be clear, every single
22 document that we send to McDonald Hopkins, we now have to send
23 to Mr. Flynn.

24 THE COURT: No, no, that's --

25 MR. FLYNN: No.

1 THE COURT: Ms. Tucker, that's not what I said. That
2 is not what I said. And I'm not going to repeat what I said.
3 Okay?

4 Well, apparently I have to repeat it. I am saying --
5 I'm saying -- I have said so far two things. One,
6 communications that are part of 11 C 1089 -- I'm not ruling on
7 anything, I'm just mediating this on the record. All right?
8 But it seems to me that what Mr. Flynn is asking is that --

9 MS. TUCKER: Well --

10 THE COURT: -- is that if you have a notice of
11 deposition where John Smith in 11 C 1089, that doesn't have to
12 go to Mr. Flynn, unless John Smith happens to be a McDonald
13 Hopkins employee. But I'm not saying that. Okay? John Smith
14 is the gardener for Ms. Alise. You want to subpoena that
15 person for some reason. The notice of deposition gets served
16 on either or the following three people: Berk, Jacobi
17 Kessler.

18 You want to serve a pleading, it goes to Berk, Jacobi,
19 Kessler.

20 Your want to send a letter about scheduling something,
21 it goes to Berk, Jacobi, Kessler.

22 Okay? You want to -- you want to set up a deposition
23 of a McDonald Hopkins person pursuant to a third-party
24 subpoena served on McDonald Hopkins or the underlying
25 litigation in state court, that communication goes to Flynn.

1 Okay?

2 MS. TUCKER: But we also have an obligation to send it
3 to the opposing -- Alise's counsel even --

4 THE COURT: And to Berk. And Berk, Jacobi or Kessler.

5 MS. TUCKER: Right.

6 THE COURT: Okay? And to the extent that someone else
7 at McDonald Hopkins picks up the phone says, I want to talk to
8 you about these discovery responses, I want to talk to you
9 about the gardener's deposition, I don't think Mr. Flynn -- I
10 think Mr. Flynn would like that to not to happen, but Mr. Flynn
11 -- and Mr. Flynn has instructed that not to happen. But he
12 doesn't know that it is not going to happen. And he knows that
13 he is on really thin ground coming here and saying, I object to
14 Ms. Tucker talking to Mr. So and so who picked up the phone to
15 call her. Okay? That would be silly. All right?

16 Because -- because -- that just would be silly.

17 MS. TUCKER: Well, but that's precisely what he's
18 doing.

19 THE COURT: Well, he is --

20 MS. TUCKER: Because we're not reaching out --

21 THE COURT: He's going over -- .

22 MR. FLYNN: When are we talking about?

23 MS. TUCKER: We are not reaching out and contacting
24 these people.

25 THE COURT: And I think what he's now saying is

1 because you have sued McDonald Hopkins and because McDonald
2 Hopkins is a witness here and because Harris is so integrally
3 involved in all this, he would prefer that you, Ms. Tucker, not
4 communication with Mr. Harris.

5 MS. TUCKER: I don't communication with Mr. Harris.

6 THE COURT: And I am not going to weigh into that
7 right now. If Mr. Harris and Mr. Saikely want to talk, more
8 power to them, to my way of thinking.

9 Mr. Harris is a big boy. He can talk to whoever he
10 wants to talk to or not. All right? But I think it is prudent
11 if you sue -- if you have sued a party -- well, I'm not going
12 to go any further. I mean, I don't think there is a
13 disagreement among you, I really don't.

14 MS. TUCKER: Yes, there --

15 MR. FLYNN: I would even offer a reciprocal --

16 MS. TUCKER: -- is.

17 THE COURT: What's the disagreement, Ms. Tucker?

18 MS. TUCKER: He says, I can't send -- I can't copy
19 Jenny McGovern even though she is Alise's counsel in this case,
20 that I cannot copy her on correspondence.

21 THE COURT: Okay.

22 MS. TUCKER: I cannot copy Mr. Harris on
23 correspondence, even though he is Alise's counsel in this case.

24 MR. FLYNN: My clients don't want to be receiving
25 these letters at 10:00 o'clock at night on a Friday, Judge.

1 I'm trying to protect them in part. It is sufficient for her
2 to contact the lawyers we have --

3 THE COURT: I suggest -- I suggest that your client,
4 McDonald Hopkins, put in writing to Ms. Tucker a letter in the
5 captioned case Tucker Firm versus Kimberly Alise, 11-1089,
6 asking nicely that any communications from this point forward
7 involving litigation of this case toward trial be sent to
8 whoever you want it to be sent to.

9 And if McGovern is not a person who you want
10 communications to be sent to anymore and Harris is not a person
11 that you want to be copied on communications, then I suggest
12 they send a letter to Ms. Tucker saying that.

13 MR. FLYNN: (Unintelligible).

14 THE COURT: Okay?

15 MR. FLYNN: Thank you.

16 THE COURT: Okay. So that -- she's got a list of who
17 now going forward with McDonald Hopkins as counsel to Ms. Alise
18 wants to be communicating about this underlying litigation. I
19 am sure -- I betcha -- that if Ms. Tucker got that letter, she
20 would honor their request.

21 Right, Ms. Tucker?

22 MS. TUCKER: Yes.

23 THE COURT: So I suggest you do that.

24 MR. FLYNN: Thank you.

25 THE COURT: I think Ms. Tucker knows well enough that

1 if is she is talking about communicating with McDonald Hopkins
2 as a third-party deponent, producer of documents or defendant
3 in a case in which you represent that firm or its partner, I
4 bet you she knows she should talk to you about that and not
5 those individually represented partners. Okay?

6 But it sounds to me like if you could clarify this, it
7 will be clear going forward. And if there are infringements on
8 that going forward, you can deal with it.

9 MR. FLYNN: Okay.

10 THE COURT: I do not blame Ms. Tucker for
11 communicating -- I mean, this case is now two and a half years
12 old, and when I was involved in it up to about six or eight
13 months ago before I was not involved in it -- well, when I was
14 involved in it, Mr. Harris was pretty integral to the
15 discussions. I spoke to Mr. Harris.

16 MR. FLYNN: I understand, Judge. But now she's sued
17 him.

18 THE COURT: Okay. That's fine.

19 MR. FLYNN: That's a game changer.

20 THE COURT: Look, I got another case.

21 MR. FLYNN: Okay.

22 THE COURT: I think if you put this in black and
23 white, you will clarify the boundary lines.

24 MR. FLYNN: Thank you.

25 MS. TUCKER: Thank you, your Honor.

1 (Which concluded the proceedings.)

2 CERTIFICATE

3 I certify that the foregoing is a correct transcript
4 from the digital recording of proceedings in the above-entitled
5 matter to the best of my ability, given the limitation of using
6 a digital-recording system.

7

8

9 */s/ Pamela S. Warren* June 6, 2013
Official Court Reporter Date
10 United States District Court
Northern District of Illinois
11 Eastern Division

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